IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant,	)	
	)	
TRIBUNE COMPANY, *et al.*,	)	
	)	
Intervenors.	)	

RESPONSE OF THE UNITED STATES TO INTERVENORS'
MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD

The United States of America respectfully submits this response to the media intervenors' motion for access to certain portions of the record. The motion seeks access to documents filed by the *pro se* defendant that have been sealed because they contain threats, racial slurs, calls to action, attempts to communicate messages to someone other than this Court, or other irrelevant and inappropriate language and do not concern any appropriate argument or request for relief from the Court.

The media intervenors' motion should be denied because the sealed documents do not constitute records of judicial proceedings to which the First Amendment or the public's qualified right of access apply. Alternatively, if the Court determines that the documents being filed by the *pro se* defendant are records of judicial proceedings, sealing is the least restrictive means to serve the government's compelling interest in preventing the defendant from sending messages to other members of *al Qaeda*. If the Court nonetheless concludes that the defendant's already filed

messages must be released in redacted form, the government requests 30 days, rather than 10, to prepare redacted versions of those documents. However, the *pro se* defendant need not be allowed to file such documents in the future because they constitute an abuse of the judicial process, and the government would respectfully request this Court to take steps to prevent the defendant from continuing to abuse the judicial process and subvert the Special Administrative Measures governing the conditions of his confinement. The defendant cannot be allowed simply to put a caption on his messages to other *al Qaeda* members, file them with the Court, and thereby broadcast them to the world.

I. Defendant Moussaoui's "Pleadings" Containing Threats, Racial Slurs, Calls to Action, and Attempts to Convey Messages to *al Qaeda* through this Court are Not Documents Filed in Connection with a Criminal Case to which the First Amendment or the Common Law Right of Access Applies.

There is no question that the media intervenors have a First Amendment right of access[1] to "documents filed in connection with . . . criminal cases," such as this case, "as well as to the hearings" held in criminal cases. *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986). As the Fourth Circuit has explained,

> [i]n deciding whether the First Amendment right of access extends to a particular kind of hearing [and the documents filed in connection

[1] The right is not absolute, however, and access to such documents may be denied if "'necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest.'" *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). This memorandum does not directly address the common-law qualified public right of access because, if the limited sealing of documents in this case satisfies the higher First Amendment standard, then the common-law qualified public right of access is not violated by the sealing. *See In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("Under the common law, a trial court's denial of access to documents is reviewed only for abuse of discretion. Under the First Amendment, on the other hand, such a denial must be necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest." (quotation marks and quoted cases omitted)).

> therewith], both the Supreme Court and the courts of appeals have looked to two factors: historical tradition and the function of public access in serving important public purposes. In the first inquiry, the court asks whether the type of proceeding at issue has traditionally been conducted in an open fashion. In the second inquiry, the court asks whether public access to the proceeding would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system.

Id. at 389. The documents sealed in this case under the August 29, 2002 order (#465) cannot reasonably be described as "documents filed in connection with" this criminal case to which the First Amendment right of access applies. In fact, as the Court has already found, the defendant's primary purpose in filing these documents is "to use the court as a vehicle through which to communicate with the outside world." Aug. 29, 2002 Order at 3. The volume and overall lack of even tangential relevance of many of the statements in these "pleadings" makes this an unprecedented situation. In criminal cases, lawyers and even *pro se* defendants generally confine the documents they file with the court to documents that are intended to move the court to grant or deny some form of relief. Thus, ordinarily, the First Amendment right of access would attach to most of the documents filed by a defendant or defense counsel. Here, however, the *pro se* defendant is attempting to use the Court to communicate his message to "his people." Aug. 29, 2002 Order at 3. As an admitted member of *al Qaeda*,[2] the defendant is presumably attempting to communicate with fellow members of that deadly terrorist organization. These "pleadings" are nothing more than an attempt to avoid the Special Administrative Measures imposed pursuant to 28 C.F.R. § 501.3, which prohibit the defendant from "communicat[ing] with the outside world." Aug. 29, 2002 Order at 3.

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[2] *See* Transcript of July 18, 2002 (arraignment on second superseding indictment and motions hearing) at 27 ("Defendant: . . . I participated in, in al Qaeda. I am a member of al Qaeda . . . . I pledge bayat to Osama bin Ladin.").

Neither of the two factors considered in deciding whether a First Amendment right of access exists – historical tradition and the function of public access in serving important public purposes – supports the media intervenors' position. First, there is no historical tradition of access to documents filed with a Court that contain threats, racial slurs, calls to action, attempts to communicate messages to someone other than the court, or other irrelevant and inappropriate language. Such language has no rational relationship to the criminal case in which the "pleadings" are filed. To the contrary, such documents may be stricken from the record at the discretion of the Court. Second, since the purpose of the "pleadings" – to convey messages to the outside world – has nothing to do with this case, public access would not serve any important public purposes. The purposes of public access identified by the Fourth Circuit – "a curb on prosecutorial or judicial misconduct" and "further[ing] the public's interest in understanding the criminal justice system" – cannot possibly be served by public access to the *pro se* defendant's attempts to communicate messages to his people. *See also Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569-73 (1980) (explaining at length the values served by public criminal trials).

The Court's August 29 order does not restrict media access to documents filed by the defendant that relate to his case and are free from objectionable language. In other words, he is free to file the kinds of papers lawyers are ordinarily permitted to file, and the media intervenors are entitled to access to those papers unless "closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enterprise I*, 464 U.S. at 510. The defendant's *pro se* status entitles him to nothing more, and the importance and high-profile nature of this case entitles the media to nothing more. Such proper public pleadings would include motions relating to any prosecutorial misconduct or judicial misconduct. Moreover, since the defendant's messages have

little to do with "the criminal justice system," public access to them cannot "further the public's interest in understanding the criminal justice system." *In re Washington Post Co.*, 807 F.2d at 389. Instead, public access would serve only to satisfy curiosity about the defendant, taint the pool of potential jurors, and, potentially, enable the defendant to communicate with other members of *al Qaeda*.

In these circumstances, this Court's limited sealing order – which applies only to documents containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language – is entirely proper, and the intervenors' motion for access should be denied.

II. Alternatively, the Documents Already Filed Should Remain Sealed as the Only Way to Serve the Government's Compelling Interest and All Future Pleadings within the Terms of the August 29, 2000 Order Should Be Returned by the Clerk Unfiled as a Sanction for the Defendant's Abuse of the Judicial Process.

A. Documents Already Filed and Maintained Under Seal

If the Court concludes, contrary to the government's view, that the "pleadings" that are subject to its August 29, 2002 order are in fact documents filed in connection with the criminal case and, therefore, subject to the First Amendment right of access, then the August 29, 2002 order should be modified to accommodate that right of access. Under the First Amendment, access to the defendant's documents may be denied if "'necessitated by a compelling government interest," and the denial of access is "narrowly tailored to serve that interest.'" *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). The media intervenors concede, for the purposes of their motion, that the government's interest in preventing the defendant from communicating with the outside world in the circumstances of this case is compelling and that the redaction of "impertinent and

scandalous" material is not barred by the First Amendment. Intervenors' Mem. at 10 & n.3. Thus the sole dispute between the government and the media is whether the Court's sealing order is narrowly tailored to serve the government's compelling interest.

The government believes that sealing is the least restrictive alternative that will completely serve its compelling interest with respect to the existing pleadings under seal. This is, in part, because it may not always be possible to catch the defendant's messages by redaction, especially if the messages are coded. In the course of recognizing the government's compelling interest in protecting its ongoing terrorism investigations, the Sixth Circuit recently accepted the government's contention that "'[b]its and pieces of information that may appear innocuous in isolation,'" may be "used by terrorist groups to help form a 'bigger picture' of the Government's terrorism investigation" in a method of intelligence gathering "'akin to the construction of a mosaic,' where an individual piece of information is not of obvious importance until pieced together with other pieces of information." *Detroit Free Press v. Ashcroft*, 2002 WL 1972919 at *23 (6th Cir. Aug. 26, 2002) (quoted cases omitted); *see also United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) ("What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."). This is also true of communications between members of *al Qaeda*: what may seem trivial and innocuous to the uninitiated in the defendant's messages may, in fact, be significant to other members of the group. It is widely known that members of *al Qaeda* have communicated in code, and thus sealing the entirety of the defendant's messages is the only way to serve the government's compelling

interest in preventing transmission of such messages.[3]

B. Documents Filed by the Defendant in the Future

Regardless of whether this Court determines that the defendant's already filed statements and messages must remain sealed, Fourth Circuit and Supreme Court case law suggests that each future pleading to be sealed must be reviewed as it is filed and measures less restrictive than sealing must be considered. *See*, *e.g.*, *In re Washington Post Co.*, 807 F.2d at 392 & n.9. Thus, in the circumstances of this case, the First Amendment case law could be interpreted to require almost daily hearings on these issues at the behest of the media intervenors.

With respect to future messages from the defendant, the government respectfully requests this Court to modify its August 29, 2002 sealing order to direct the Clerk not to file any future pleadings filed by the defendant, *pro se*, containing threats, racial slurs, calls to action, attempts to communicate messages to someone other than this Court, or other irrelevant and inappropriate language but to return such documents to the defendant unfiled. The government agrees with this Court's rejection of the defendant's suggestion that the Court "redact inappropriate language from his future pleadings because it forces the prosecutors and the Court to waste resources editing the defendant's writings, which predominantly contain inappropriate rhetoric." Aug. 29, 2002 Order at

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[3] The government urges this Court to find that the documents are not pleadings filed in connection with this criminal case within the meaning of the *Washington Post* case or that sealing them is narrowly tailored to serve a compelling governmental interest. But if the Court rejects these arguments and concludes, as the intervenors ask, that the documents must be released in a redacted form, then the government respectfully requests 30 days, rather than ten, to provide the Court with redacted versions of the documents. As the Court is aware, the volume of these documents is significant and growing daily. Moreover, the government's recommendations regarding which portions should be redacted will not be the work solely of the prosecutors in this case. The decisions must be made in consultation with other individuals in the Department of Justice and with other law enforcement and intelligence agencies. The ten days proposed by the media intervenors is simply unrealistic.

4 n.3. If the defendant wants his pleadings to be filed, he should "limit his writings to appropriate requests for relevant judicial relief." *Id.* The defendant's suggestion that the Court redact inappropriate language is nothing more than a tactic to divert prosecutorial and judicial resources.

The Court has the inherent authority to reject the defendant's inappropriate "pleadings" to protect the integrity of the judicial process. As the Supreme Court has explained, federal courts have the inherent power "to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823 (1996). An important part of a court's discretionary inherent powers is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).

The narrow order suggested by the government – which would apply only to the limited class of "pleadings" filed by the *pro se* defendant that contain threats, racial slurs, calls to action, attempts to communicate messages to someone other than this Court, or other irrelevant and inappropriate language – is an appropriate exercise of the Court's inherent power to remedy the defendant's admitted abuse of right to self-representation. Moreover, the defendant can avoid having his pleadings returned by the Clerk (and instead, have them filed in the public record) if he simply observes the standards that would be imposed on any other litigant. As this Court has already explained, the pleadings the defendant is filing would not be (and are not) "tolerated from an attorney practicing in this court." Aug. 29, 2002 Order at 3. The defendant has been "warned numerous times," *id*., and such pleadings should no longer be tolerated from the defendant. For reasons of the highest importance, the defendant cannot be allowed to "use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement." *Id.*

The relief the media intervenors seek with respect to future pleadings, based on the volume and frequency of the messages filed to date by the defendant, would literally require the prosecution team to spend significant time every day reviewing the latest messages, consulting with the Department of Justice and intelligence agencies, and preparing redacted versions to submit to the Court. It would further require the Court to spend significant time each day reviewing the messages and the proposed redacted versions. In short, the relief requested by the media intervenors would allow the defendant – simply by filing more and more "pleadings" – to make preparation for the defendant's trial extraordinarily difficult, both for the Court and for the government, and divert the judiciary's scarce resources away from important, relevant matters both in this case and in the Court's other cases. Moreover, the Court may also be called upon regularly by the media to consider their objections to sealing a particular pleading or to the extent of redactions made to a pleading. At the typical rate of several pleadings per day, this is plainly unworkable.

There can be no doubt that the Court has the inherent authority to prevent the defendant from attempting to derail his prosecution and creating a bottleneck that prevents the Court from attending to the other cases on its docket. "Article III courts were imbued with an array of 'inherent powers' in performing their case-management function from the moment of their establishment, powers never specifically enumerated in the Constitution or in legislative enactments, yet 'necessary to the exercise of all other[ ] [enumerated judicial powers].'" *United States v. Kouri-Perez*, 187 F.3d 1, 7 (1st Cir. 1999); *see also In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984) ("Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions."). The defendant has been given numerous opportunities to conform his filings to the Court's order, and he has persisted in filing inappropriate

messages to "his 'people.'" Aug. 29, 2002 Order at 3. The proposed sanction is less drastic than other possible sanctions – such as barring the defendant from filing anything – that would be well within this Court's discretion.

In sum, as the Court has already concluded, these messages to the defendant's "people" are not proper pleadings. Aug. 29, 2002 Order at 3. No rule, statute or principle of constitutional law requires that the defendant be allowed to file the type of pleadings that he is filing in this case and that the government suggests should no longer be accepted by this Court. Accordingly, the Court should direct the Clerk to return unfiled to the defendant any pleadings that contain threats, racial slurs, calls to action, attempts to communicate messages to someone other than this Court, or other irrelevant and inappropriate language. [4]

[4] The Court may wish to consider directing the Clerk to provide copies of any such pleadings to stand-by counsel and counsel for the government to enable the parties to bring to the Court's attention any concerns counsel may have with the administration of the Court's order or any legitimate issues raised in the documents.

III. Conclusion

For the reasons stated, the media intervenors' motion for access should be denied. Alternatively, the motion should be granted in part with respect to those documents already filed under seal and the government should be ordered to provide proposed redacted copies to the Court within 30 days of the date of its order, but the August 29, 2002 order should be modified with respect to any future pleadings subject to its terms as set forth above. A proposed order is attached for the consideration of the Court.

Respectfully submitted,

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By: /s/

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CERTIFICATE OF SERVICE

I certify that on September 19, 2002, a copy of the foregoing pleading and proposed Order was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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